



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Mount Pearl (City) v. Power*, 2025 NLCA 16

Date: April 29, 2025

Docket Number: 202201H0052

BETWEEN:

CITY OF MOUNT PEARL

FIRST APPELLANT

AND:

MOUNT PEARL CITY COUNCIL

SECOND APPELLANT

AND:

ANDREA POWER

FIRST RESPONDENT

AND:

ANDREW LEDWELL

SECOND RESPONDENT

AND:

STEVE KENT

THIRD RESPONDENT

Coram: W.H. Goodridge, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202001G3716 and 202001G3725
(2022 NLSC 129)

Appeal Heard: December 11, 2024

Judgment Rendered: April 29, 2025

Reasons for Judgment by: K.J. O’Brien J.A.

Concurred in by: W.H. Goodridge and F.J. Knickle JJ.A.

Counsel for the Appellants: J. Alexander Templeton and
Morgan E. Chafe

Counsel for the First Respondent: Did not Participate

Counsel for the Second Respondent: Keri-Lynn Power

Counsel for the Third Respondent: Kyle R. Rees

Authorities Cited:

CASES CITED: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Eastern Road Builders Ltd. v. Construction General Labourers, Rock and Tunnel Workers, Local 1208 et al.*, 1990 CanLII 7139 (NLSC); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75; *British Columbia v. Philip Morris International, Inc.*, 2016 BCCA 363; *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2019 BCCA 439; *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*, 1997 CanLII 16007 (NLSC); *The Queen v. Wray*, [1971] S.C.R. 272; *Mascouche (Ville) c. Houle*, 1999 CanLII 13256 (QCCA); *O’Dea v. O’Dea*, 2019 NLSC 206; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, leave to appeal to SCC refused, 37793 (17 May 2018); *Dwyer v. Canada*, 2003 FCA 322; *Clark v. Complaints Inquiry Committee*, 2012 ABCA 152; *Sliwin v. College of Physicians and Surgeons*, 2017 ONSC 1947; *Hollick v. Alberta (Director of Saferoads)*, 2023 ABKB 61; *Jones v. Tsige*, 2012 ONCA 32; *Capital District Health Authority v. Murray*, 2017 NSCA 28; *Unipco Ltd., a body corporate, Unipco Purchasing Program, a partnership v. Scott Mullin*, 2023 NBKB 200; *B.M. v. W.S.*, 2024 ABKB 158, aff’d 2024 ABCA

355; *Situmorang v. Google, LLC*, 2024 BCCA 9; *Roque v. Peters*, 2022 MBQB 34; *Bierman v. Haidash*, 2021 SKQB 44; *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137; *Butt v. Kiewit Energy Corporation*, 2019 NLSC 119; *Dawe v. Nova Collection Services (Nfld.) Ltd.*, 1998 CarswellNfld 270 (NLPC); *Hagan v. Drover*, 2009 NLTD 160; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181; *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, leave to appeal to SCC refused, 38630 (19 September 2019).

STATUTES CONSIDERED: *City of Mount Pearl Act*, RSNL 1990, c. C-16, sections 21, 58; *Privacy Act*, RSNL 1990, c. P-22, section 3.

ARTICLES CONSIDERED: Peter Sankoff & Zachary Wilson, “A Jurisprudential “House of Cards”: The Power to Exclude Improperly Obtained Evidence in Civil Proceedings” (2021) 99:1 Can Bar Rev 145; Ian N. Roher & Eden Ifergan “A Principled Approach to Admissibility: The Admissibility of Wrongfully Obtained Evidence in a Civil Proceeding Revisited” in Todd L. Archibald, ed, *Annual Review of Civil Litigation 2020* (Toronto: Thomson Reuters Canada, 2020).

K.J. O’ Brien J.A.:

[1] This is an appeal of a judge’s interlocutory decision to exclude certain text messages from the court record to be used in a statutory appeal under the *City of Mount Pearl Act*, RSNL 1990, c. C-16 (the “*City of Mount Pearl Act*”). The statutory appeal was taken by two city councilors, Andrea Power and Andrew Ledwell (together, the “Councilors”), who appealed a City of Mount Pearl Council resolution declaring their Council offices vacant because they failed to disclose a conflict of interest in a matter discussed by Council.

OVERVIEW

[2] It is helpful to begin with the facts giving rise to this appeal.

[3] A workplace harassment complaint was made against the then City of Mount Pearl Chief Administrative Officer, Steve Kent. In October 2019, the City placed Mr. Kent on paid administrative leave and started an external investigation of the complaint. Upon being placed on leave, Mr. Kent returned a City-owned iPad, which he had been using for work. While he was working, he had used the iPad to access

his personal Facebook Messenger account through the Facebook Messenger app. Shortly after returning the iPad, Mr. Kent changed the password on his Facebook Messenger account, believing that would prevent anyone from accessing his account using the iPad. He was wrong. Because the City iPad was registered with the app as a “trusted device”, a user of the City iPad could view his Facebook Messenger messages without a password.

[4] After the City took back the iPad, its IT department saw a banner notification on it that appeared to be for a message between Mr. Kent and Mr. Ledwell or Ms. Power related to the workplace harassment investigation. The banner notification showed information about the sender and at least part of the message.

[5] As a result of the IT department’s observation, Mona Lewis, former City Clerk and Acting Chief Administrative Officer for the City, took the iPad and began to monitor the banner notifications. When she saw a banner notification from the Councilors that she thought related to the harassment investigation, she opened the message and read it. She also read messages from Mr. Kent to the Councilors. She later instructed the IT department to monitor the banner notifications and read the messages in the same way. This monitoring continued for approximately seven months. During this period, most of the messages the City monitored were personal and unrelated to the harassment investigation.

[6] The City used messages between Mr. Kent and the Councilors to support its decision to vacate the Councilors’ council seats. These messages were referred to by the judge as the “Disputed Messages”, and I will use the same term. The City passed the resolutions to vacate the Councilors’ seats in June 2020.

The legal proceedings

[7] Next, it is helpful to explain the various legal proceedings that flowed from the above facts.

[8] The Councilors each appealed the Council resolutions vacating their seats. Their appeals were ordered to be heard concurrently, so I will refer to them collectively as the “Councilors’ appeals” in this decision. Section 21 of the *City of Mount Pearl Act* governs appeals to the Supreme Court of Newfoundland and Labrador of Council resolutions vacating Council seats and sets out the procedure to be followed. Particularly relevant to this appeal is section 21(5):

21(5) The city clerk shall produce before the judge all papers and documents in the possession of the council relevant to the appeal.

[9] The judge referred to the documents the City produced in accordance with section 21(5) as the “Record”, and I will do the same.

[10] Mr. Ledwell and the City disagreed about whether the Disputed Messages should be included in the Record. Mr. Ledwell was concerned about how the Disputed Messages had been collected and about Mr. Kent’s claim of having his privacy breached. Mr. Kent’s claim will be explained below. As a result of his concerns, Mr. Ledwell filed an interlocutory application seeking direction from the court as to the content of the Record. He also requested that notice of the application be given to Mr. Kent.

[11] A judge of the Supreme Court, not the judge whose decision is under appeal, ordered that Mr. Kent be given notice of Mr. Ledwell’s application, to give Mr. Kent an opportunity to intervene.

[12] Upon being notified of the application, Mr. Kent brought an interlocutory application seeking leave to intervene in the Councilors’ appeals. In the application, Mr. Kent also sought an order that the Disputed Messages be excluded from the Record or, in the alternative, that the Disputed Messages be sealed or be made subject of a publication ban. The Councilors supported this application.

[13] The judge’s decision on Mr. Kent’s interlocutory application is the subject of the present appeal. However, before explaining that decision, it is necessary to introduce Mr. Kent’s legal action against the City arising from the same facts.

[14] Mr. Kent has filed a lawsuit against the City claiming, among other claims, that the City wrongfully repudiated his employment contract and committed the tort of breach of privacy by monitoring and collecting his personal messages (“Kent’s Action”). Kent’s Action seeks damages and an injunction under the *Privacy Act*, RSNL 1990, c. P-22, enjoining further breaches of his privacy. The City has filed a defence and counterclaim. When the judge rendered his decision on Mr. Kent’s interlocutory application, Kent’s Action was unresolved and at the pre-trial stage.

The decision being appealed

[15] Mr. Kent's interlocutory application was heard over three days. In an oral decision on the second day of the hearing, the judge granted Mr. Kent leave to intervene in the Councilors' appeals for the limited purpose of asserting and defending his privacy interests in the Disputed Messages before they were produced as part of the Record (Appeal Book, Vol. 1, Tab 3, Transcript, May 4, 2022, at p. 12). The judge's oral decision allowing Mr. Kent's intervention is not under appeal.

[16] Following the hearing, the judge granted Mr. Kent's application seeking that the Disputed Messages be excluded from the Record, or otherwise protected, in a written decision (2022 NLSC 129, the "Decision"). The Decision is the subject of this appeal.

[17] In the Decision, the judge stated that he had to decide two issues. The first was whether the City infringed Mr. Kent's privacy rights. The second was, if there was an infringement, what was Mr. Kent's relief (Decision, at para. 14).

[18] The judge made several significant findings. First, he decided that a common law right of privacy and a related common law tort for intrusion upon seclusion exist in Newfoundland and Labrador (Decision, at paras. 18, 26). Second, the judge found that the City had breached Mr. Kent's common law right of privacy. He also found that the City had committed a tort against Mr. Kent under the *Privacy Act* (Decision, at paras. 92, 98).

[19] Finally, the judge determined that the appropriate remedy for Mr. Kent was to exclude the Disputed Messages from the Record in the Councilors' appeals. The judge reasoned that the City's actions resulted in an abuse of process and that the only way to restore fairness in the proceeding was to exclude the Disputed Messages (Decision, at paras. 94-96, 113). The judge determined that remedies such as sealing the Record or a publication ban would not be sufficient to protect the administration of justice (Decision, at para. 114).

Positions of the parties

[20] The City appeals the Decision on several grounds. It alleges that the judge erred by treating the Councilors' appeals as a *de novo* hearing as opposed to an appeal on the record, and thus by treating the question of the Record's contents a question of evidence rather than one of appellate process. The City alleges that the

judge exceeded his jurisdiction by deciding matters that were not before him, namely that the City had committed a breach of privacy both at common law and pursuant to the *Privacy Act*. In doing so, the City alleges that the judge erred by failing to balance Mr. Kent's interests with those of the parties to the Councilors' appeals. The City also alleges that the judge erred by failing to consider defences under the *Privacy Act* or justification for the City's actions under section 58 of the *City of Mount Pearl Act*. Finally, the City alleges that the judge erred by failing to apply sections 8 and 24(2) of the *Charter*.

[21] Ms. Power did not participate in the appeal. Mr. Ledwell and Mr. Kent did. They filed separate briefs and, although they did not address all the issues in the same way, they both argued against the City's positions and asserted that the judge made no error.

Summary of this decision

[22] I would allow the appeal. To explain my decision, rather than address each issue raised by the City in turn, I will review three principal errors the judge made. I will discuss each of these errors as a separate issue. In doing so, I will address the main issues raised by the City.

[23] First, the judge erred by deciding the wrong legal issues. To decide the application, the judge had to decide whether the Disputed Messages should be filed as part of the Record for the Councilors' appeals, with or without any restrictions such as a sealing order or a publication ban. At this preliminary stage, he did not have to decide whether the City ought to have relied on the Disputed Messages to support their decision to vacate the Councilors' seats. The judge thus erred when he framed and decided the issues as: (i) Did the City infringe Mr. Kent's privacy rights in the Disputed Messages? and (ii) If so, what is Mr. Kent's relief?

[24] Second, the judge erred in his consideration of abuse of process. The Supreme Court of Canada has stated that the primary focus of the doctrine of abuse of process is the integrity of the court's adjudicative functions, with less focus on the interests of the parties (*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at para. 36; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 43). Wrongful conduct in an investigation can support a finding of an abuse of process if the conduct is such that it taints the resulting court proceeding to such a degree that the integrity of the proceeding is compromised. However, before ordering a remedy that would effectively halt the proceeding, a

judge must balance the public interest in a fair administrative process untainted by abuse against the competing public interest in having the proceeding decided on its merits (*Abrametz*, at paras. 83-85). In the present case, the judge failed to do such a balancing or consider the public interest in the truth finding process in addressing the Councilors' alleged conflict of interest.

[25] Finally, the judge erred by making legal findings about the City's liability that were unnecessary for him to make to decide the application. The City's liability to Mr. Kent is a central question in Kent's Action but is not at issue in the Councilors' appeals. More particularly, the judge erred in recognizing a tort of intrusion upon seclusion in this province. Until the Decision, the status of the tort in Newfoundland and Labrador was unsettled. Generally, new torts should not be introduced to the common law when adequate remedies already exist to address the harm done. It was not necessary for the judge to rule upon the new tort, and he should not have.

ISSUE 1: The Judge Decided the Wrong Legal Issues

[26] The judge identified the first issue he had to decide as whether the City had infringed Mr. Kent's privacy rights. This was an incorrect framing of what was at issue. The judge had to decide whether the Disputed Messages should be filed as part of the Record for the Councilors' appeals. In making this decision, he had to consider Mr. Kent's privacy claim because if the Disputed Messages were filed with the court without restriction, they would be open to the public thus undermining Mr. Kent's privacy claim before it could be adjudicated in Kent's Action. However, that the judge had to consider Mr. Kent's privacy claim does not equate to his having to determine whether the City had infringed Mr. Kent's privacy rights.

[27] Undoubtedly, the Disputed Messages were relevant to the Councilors' appeals because Council relied on what the Councilors communicated in those messages to decide that the Councilors' seats should be vacated. On a plain reading of section 21(5) of the *City of Mount Pearl Act*, the city clerk was required to produce the Disputed Messages before the judge because they were in Council's possession and relevant. This is logical, as it would be difficult for the judge to properly adjudicate the appeal without the key document Council had relied upon.

[28] This was a preliminary interlocutory application and, in deciding it, the judge ought to have maintained the integrity of the Councilors' appeals to the greatest extent possible while protecting Mr. Kent's privacy interest to the extent he determined such protection to be appropriate. He might have done this by ordering

that the Disputed Messages be sealed with restrictions placed on their viewing or otherwise be subject to a publication ban. In fact, these were the alternative remedies that Mr. Kent sought. Confidential information may be part of an administrative record (*Eastern Road Builders Ltd. v. Construction General Labourers, Rock and Tunnel Workers, Local 1208 et al.*, 1990 CanLII 7139 (NLSC), at paras. 24-25). To determine whether a restriction on access to the Record was appropriate, the judge would have had to apply the legal test originally set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and refined in *R. v. Mentuck*, 2001 SCC 67, [2001] 3 S.C.R. 442, and *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75. This test, which must be applied whenever a judge considers limiting the openness of court proceedings, includes a balancing of the competing interests at stake.

[29] However, the judge did not consider the appropriateness of a sealing order or a publication ban. He simply stated that neither would be “sufficient in protecting the administration of justice” (Decision, at para. 114). He did not support this statement with any explanation or analysis, thus making it impossible for this Court to meaningfully review his conclusion on this point.

[30] Instead of considering restricting access to the Disputed Messages, the judge took the more drastic step of excluding the Disputed Messages from the Record altogether based on what he found to be an abuse of process by the City. The way in which he proceeded had two significant consequences, which reveal why his treatment of the legal issues was in error.

[31] The first consequence was that the judge effectively prevented a hearing of the Councilors’ appeals on the merits because the City’s position was if the messages were excluded, its case against the Councilors would be undermined (Decision, at para. 72). The judge excluded the very evidence that he needed to decide the appeal and that the legislation required be produced to him.

[32] The second consequence, which is discussed in more detail with respect to Issue 3, was that the judge made legal findings with respect to the City’s infringement of Mr. Kent’s privacy rights that were at issue in Kent’s Action, but that were not at issue in the Councilors’ appeals, at least not directly. Mr. Kent’s intervention should not have been permitted to add issues and unnecessarily widen the litigation or to take the litigation away from those directly affected by it (*British Columbia v. Philip Morris International, Inc.*, 2016 BCCA 363, at paras. 25-27; *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2019 BCCA

439, at para. 23; *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*, 1997 CanLII 16007 (NLSC), at para. 9).

[33] That is not to say that the City's conduct in collecting the Disputed Messages would not be at issue in the appeals. In assessing whether the City erred in fact or law in deciding to vacate the Councilors' seats, it is likely that the lawfulness or propriety of the City's conduct in collecting the Disputed Messages would have been in issue.

[34] Historically, evidence that was relevant and otherwise admissible, was admitted regardless of how it was obtained (*The Queen v. Wray*, [1971] S.C.R. 272). However, the advent of the *Charter* and developments in the common law have led to a softening of this rigid approach and today wrongfully obtained evidence may be excluded from court proceedings (see Peter Sankoff & Zachary Wilson, "A Jurisprudential "House of Cards": The Power to Exclude Improperly Obtained Evidence in Civil Proceedings" (2021) 99:1 Can Bar Rev 145; Ian N. Roher & Eden Ifergan, "A Principled Approach to Admissibility: The Admissibility of Wrongfully Obtained Evidence in a Civil Proceeding Revisited" in Todd L. Archibald, ed, *Annual Review of Civil Litigation 2020* (Toronto: Thomson Reuters Canada, 2020); for a decision about employer monitoring of employee communications, see *Mascouche (Ville) c. Houle*, 1999 CanLII 13256 (QCCA)).

[35] However, whether the City should be permitted to rely on the Disputed Messages because of procedural unfairness, an abuse of the court's process, or otherwise, was an issue best left for the hearing of the Councilors' appeals for several reasons. First, the appropriate use of the Disputed Messages in the appeals ought to have been considered from the perspective of procedural fairness in relation to the decision to vacate the Councilors' seats. Mr. Kent had no interest in the decision to vacate the seats and so the judge's singular focus as to what was fair to Mr. Kent was in error.

[36] Moreover, the Councilors' interests in the Disputed Messages and expectations of fairness may have differed significantly from those of Mr. Kent. When the judge excluded the Disputed Messages, it was unclear what, if any, privacy interest the Councilors claimed in them or if they were alleging a breach of procedural fairness or an abuse of the court's process. The Councilors had not alleged any breach of their section 8 *Charter* rights.

[37] Further, in proceeding as he did, the judge did not consider the City's interest in ensuring that Council members abide by their code of ethics and declare conflicts of interests. Nor did he consider the public's interest in truth seeking and ensuring that elected officials fulfill their roles ethically.

[38] What was ultimately at issue in the Councilors' appeals was the vacation of their seats because of undeclared conflicts of interest. Although Mr. Kent's interests in the Disputed Messages might be relevant to the analysis of what use the City should be permitted to make of those messages in the appeals, his interests were not the sole, or even the primary, interests engaged. The other interests mentioned above must be considered and weighed in the balance, namely, the Councilors' interests in the Disputed Messages and in having a fair hearing, the City's interest in avoiding councilors acting in conflict of interest, and the public interest in truth seeking and having the case decided on its merits. Had the judge left consideration of what use should be made of the Disputed Messages to a later stage of proceedings, these other interests would have been more apparent, and the judge would have been able to take a more expansive, and correct, view of the interests engaged.

[39] Although, I would not go so far to say that the judge could not have considered the appropriate use of the Disputed Messages as a preliminary matter, he was required to consider the issue in the full context of the Councilors' appeals and the various interests, defences, and justifications in play. Had he fully addressed the issue at a preliminary stage, there would be no reversible error in his choice of procedure alone.

[40] Because the judge erred by deciding the wrong legal issues, I would allow the appeal. Although that would be sufficient to dispose of the matter, I will nevertheless address errors the judge made with respect to his application of the doctrine of abuse of process and with his treatment of the tort of intrusion upon seclusion.

ISSUE 2: The Judge Erred in Applying the Abuse of Process Doctrine

[41] It follows from my consideration of Issue 1 that, without a complete assessment, the judge should have left consideration of the abuse of process doctrine for the hearing of the Councilors' appeals, assuming that there would have been reason for him to consider it at that time. However, as the judge did consider abuse of process, I will address specific errors he made in doing so.

[42] A significant part of the Decision was devoted to the judge’s analysis of whether the City had infringed Mr. Kent’s privacy rights (at paras. 16-90). Having concluded that the City breached both Mr. Kent’s common law right of privacy and committed a tort under the *Privacy Act*, the judge next considered the appropriate remedy. His focus remained on Mr. Kent:

[93] As this is not an action by Mr. Kent seeking relief under the common law or under the *Privacy Act*, I cannot order the City to deliver to Mr. Kent all copies of the Disputed Messages, including those it gave to the independent investigator.

[94] However, in Donald J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters, 2015) at page 6 - 61 states, “[I]t is within the court’s discretion to refuse to admit evidence ... on grounds of abuse of process ...”.

[43] Following a brief review of law relevant to the remedy for abuse of process as explained in *O’Dea v. O’Dea*, 2019 NLSC 206, the judge concluded that he should seek to restore fairness. He began by considering the unfairness that the City had caused (at paras. 95-96). In this part of his analysis, the judge examined the unfairness that the City caused Mr. Kent, not any possible unfairness in the Councilor’s appeals. He concluded:

[113] To restore fairness and to protect the integrity of the administration of justice, the Disputed Messages, evidence the City obtained by breaching Mr. Kent’s privacy, shall not be part of the Record.

[44] The judge made this decision knowing the City’s position that if the messages were excluded, the City’s case against the Councilors would be undermined. The judge considered this to be irrelevant (at para. 72).

The law of abuse of process

[45] To explain how the judge erred, it is necessary to review the law of abuse of process.

[46] The doctrine of abuse of process is rooted in a court’s inherent and residual discretion to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute (*Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, at para. 33; *Abrametz*, at para. 33; *Toronto (City)*, at paras. 35-37). In applying the

doctrine, the primary focus should be the integrity of the courts' adjudicative functions, with less focus on the party's interests. The proper administration of justice and ensuring fairness are central to the doctrine, however, the doctrine is flexible (*Saskatchewan (Environment)*, at para. 34; *Abrametz*, at paras. 35-36; *Toronto (City)*, at para. 43).

[47] In administrative proceedings, abuse of process is a question of procedural fairness (*Abrametz*, at para. 38; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 105-107, 121). Sometimes abuse of process is found when a party's ability to have a fair hearing has been prejudiced or the proceedings have caused some other prejudice specific to the party. Sometimes abuse of process arises where the broader public interest in the fair administration of justice is engaged and the doctrine is invoked to protect the integrity of the proceedings (*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, at para. 207, leave to appeal to SCC refused, 37793 (17 May 2018)).

[48] There is no single remedy for abuse of process, but the most drastic remedy is a stay of proceedings. The Supreme Court of Canada considered the remedy in *Abrametz* in addressing when a delay in administrative proceedings may amount to an abuse of process. *Abrametz* concerned disciplinary proceedings against a lawyer, and the Court specifically considered when a stay of proceedings should be ordered, highlighting the need to balance the public interest in fair proceedings against the public interest in having the disciplinary complaint decided on its merits:

[83] A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final"; the process will be permanently stayed: *Regan*, at para. 53. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should be granted only in the "clearest of cases", when the abuse falls at the high end of the spectrum of seriousness: *Blencoe*, at para. 120, citing *Power*, at p. 616.

[84] The decision whether to grant a stay involves a balancing of public interests. On one hand, the public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On the other hand, the public has an interest in the resolution of administrative cases on the merits. A balance must be struck between the public interest in a *fair administrative process untainted by abuse* and the competing public interest in having the *complaint decided on its merits*: *Blencoe*, at paras. 118-21 and 154; *Conway*, at p. 1667; *Robertson v. British Columbia (Commissioner, Teachers Act)*, 2014 BCCA 331, 64 B.C.L.R. (5th) 258, at paras. 78-80; *Diaz-Rodriguez*, at paras. 71-73; *Law Society of Upper Canada*

v. Abbott, 2017 ONCA 525, 139 O.R. (3d) 290, at paras. 61-63 (leave to appeal refused, [2018] 1 S.C.R. v).

[85] When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is *yes*, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public's interest in the proper administration of justice.

[49] Excluding evidence is a less drastic remedy than a stay of proceedings. However, if the effect of excluding the evidence will be that proceedings will be undermined to the extent of being halted, then the same considerations are relevant. Cases in which the abuse of process doctrine has been considered in relation to wrongfully obtained evidence or other wrongful investigation techniques illustrate the point.

[50] In *Dwyer v. Canada*, 2003 FCA 322, the Federal Court of Appeal considered whether a Tax Court judge had erred in failing to find an abuse of process because of the wrongful conduct of a Revenue Canada officer who executed a search warrant at Mr. Dwyer's residence. Mr. Dwyer alleged the abuse of process in his appeal of a tax reassessment. After the execution of the search warrant, the officer had asked Mr. Dwyer for a loan. Mr. Dwyer characterized his behavior as an attempt at extortion. The Federal Court of Appeal cited *Blencoe* for the proposition that, in order to conclude that there has been abuse of process, the proceedings must be tainted to such a degree that it amounts to one of the clearest of cases, and that the proceedings must be unfair to the point that they are contrary to the interests of justice (at para. 54). Although the Federal Court of Appeal characterized the officer's conduct, which was not discussed with or sanctioned by his superior, as "reprehensible", it was satisfied that it did not result in any unfairness to Mr. Dwyer and was not sufficient to justify a finding of abuse of process (at para. 55).

[51] In *Clark v. Complaints Inquiry Committee*, 2012 ABCA 152, the Alberta Court of Appeal reviewed a decision of an appeal panel appointed under legislation regulating the accounting profession in Alberta, which stayed proceedings for professional misconduct against a chartered accountant based on abuse of process. The investigator assigned to the complaint had conducted the investigation using his wife's email account. His wife thus had access to the confidential information he collected; whether she had seen it or shared it with others was unknown. The appeal panel found an abuse of process and stayed the disciplinary hearings. The Court of

Appeal upheld this decision as reasonable. It noted that a proper balancing of the competing interests had been done:

[18] The Appeal Tribunal was not immune to the irony that the CIC's investigator had disclosed confidential information to third parties while investigating a complaint alleging Clark had done the same. Furthermore, it was aware that this was not only a breach of a duty of confidence, but a specific contravention of the Institute's enabling legislation. It appears that the Appeal Tribunal, therefore, in balancing the need to punish unprofessional conduct in the public interest and maintaining the integrity and confidence of its disciplinary process, determined that stay was the only appropriate remedy. In other words, the stay was the only way to hold the CIC to the standard of conduct expected of all members of the profession.

[52] *Sliwin v. College of Physicians and Surgeons*, 2017 ONSC 1947, is another professional discipline case, but with a different outcome. Dr. Sliwin appealed a decision of the College's discipline committee finding that he had committed professional misconduct by engaging in sexual abuse with a patient. One of the grounds of appeal was that the committee had erred by failing to find an abuse of process and ordering a stay of proceedings based on the conduct of the College's registrar. The College's registrar had contacted the Canadian Medical Protective Association ("CMPA") to discourage the CMPA from funding a constitutional challenge on Dr. Sliwin's behalf. The committee characterized the communication as a benign interchange. On appeal, the Divisional Court did not agree with this characterization. It found that the registrar's email was a carefully veiled, albeit unsuccessful, attempt by the registrar to have the CMPA review its funding decision. The court considered the registrar's conduct to be improper (at paras. 81-82).

[53] However, the court found that neither the fairness of the hearing nor the appearance of hearing fairness was compromised, and that no unfairness had been perpetuated by the conduct of the hearing. Further, it found that the registrar's conduct did not rise to the level of an abuse of process that would compromise the integrity of the judicial process requiring a stay of proceedings. Even if there was an abuse of process, upon conducting the balancing exercise, the court determined that the public interest in an adjudication on the merits of the serious allegation of sexual abuse outweighed any potential harm to the integrity of the judicial system warranting a stay of proceedings (at para. 92).

[54] A final example is *Hollick v. Alberta (Director of Saferoads)*, 2023 ABKB 61. *Hollick* was a judicial review of an adjudicator's decision upholding a Notice of Administrative Penalty for impaired driving against Mr. Hollick, pursuant to Alberta's SafeRoads regime. Under this regime, an adjudicator is not a court of

competent jurisdiction to grant *Charter* remedies, for example under section 24(2), but may still exclude evidence resulting from wrongful behaviour by the police if relying on it would rise to an abuse of process or a breach of natural justice (at paras. 43, 45).

[55] Although the adjudicator found that the procedure followed by the police officer in Mr. Hollick's case was unfair because it did not comply with the legislation and was an unreasonable search and seizure, the evidence was admitted. The adjudicator found that the officer was engaged in a traffic investigation for a valid traffic safety purpose and had grounds to assess Mr. Hollick's impairment. Even though the procedure the officer followed was not fully compliant, the officer's conduct was not so egregious, abusive or improper that it outweighed the interest in traffic and public safety. The court upheld the adjudicator's decision as reasonable.

How the judge erred

[56] Mr. Kent had no interest in the ultimate outcome of the Councilors' appeals. His only concern was the protection of his alleged privacy interest, not the procedural fairness of the appeals generally as the Disputed Messages were not being used against him. Any possible abuse of process would arise from the broader public interest in the fair administration of justice and the need to protect the integrity of the proceedings. The judge was thus in error by making Mr. Kent's interests the focus of his analysis and by searching for a remedy that would restore fairness to Mr. Kent. This was not the appropriate proceeding or venue to find redress for Mr. Kent. If Mr. Kent establishes his claim in Kent's Action, he will have the right to a remedy in that proceeding.

[57] Contrary to the judge's holding, it was not irrelevant that the City's case against the Councilors would be undermined if the Disputed Messages were excluded. The public has an interest in ensuring that elected councilors fulfill their roles ethically and that allegations of misconduct by councilors are adjudicated on their merits. Thus, before finding that an abuse of process justified excluding the Disputed Messages the judge should have balanced the public interest in a fair administrative process untainted by abuse, against the competing public interest in having the allegations decided on their merits.

[58] Such a balancing would properly include consideration of the seriousness of the City's perceived wrongful behavior, the motivation of City personnel for acting as they did, and the circumstances that brought the Disputed Messages to their

attention. The City's asserted justifications for its actions, under the *Privacy Act*, the *City of Mount Pearl Act*, or otherwise, would be relevant to the analysis. The analysis would also include a consideration of the seriousness of the allegations against the Councilors. This is not a closed list, as there may be other relevant considerations.

[59] Finally, the judge erred in failing to meaningfully consider whether other remedies, short of excluding the Disputed Messages, would have adequately protected the public interest in the proper administration of justice (*Abrametz*, at para. 85). The judge did not consider admitting the initial message that spontaneously appeared on the iPad. Nor did he consider admitting messages that were already in the public domain because they had appeared in a news story. Although the judge stated that remedies such as a sealing of the Record or a publication ban would not be sufficient to protect the administration of justice, as already noted, he did not explain why this was so (Decision, at para. 114). He ought to have.

[60] If the Disputed Messages, or some of them, were necessary for the City's case, excluding them would amount to a stay of proceedings against the Councilors, which is reserved for the "clearest of cases" and when the abuse falls at the high end of the spectrum of seriousness. The judge should have turned his mind to, and determined, whether going ahead with the Councilors' appeals would have resulted in more harm to the public interest than if the proceedings against the Councilors were halted. Ultimately, that was the question at issue.

ISSUE 3: The Judge Erred in Considering a Common Law Tort of Privacy

[61] One of the particularities of this case is that the City's monitoring of the Disputed Messages produced two very different legal proceedings: Kent's Action, in which Mr. Kent seeks damages and other relief from the City for breach of privacy, and the present proceeding, in which the Councilors' appeal the Council resolution declaring their Council offices vacant.

[62] As already discussed, in deciding the Councilors' appeals the judge may ultimately have had to consider the City's conduct in collecting the Disputed Messages. That consideration may necessarily have required some findings of fact and engaged some analysis of whether the City's actions were justified or wrongful.

However, in doing so, the judge should have intruded on the central issues in Kent's Action as minimally as possible.

[63] When one or more instances of litigation arise from the same set of facts sometimes the matters are joined or otherwise dealt with together. Other times the proceedings remain independent from one another, such as is the case here. In such circumstances, a court dealing with one matter may have to make findings that bear upon issues in one or more of the related matters. Although the findings of a court in one matter will not be binding on a court hearing a related matter, whether because of the rules of *stare decisis* or because each case will have a unique evidentiary record, those findings may still have some impact or influence on the related proceeding. A judge hearing a proceeding with one or more related, unresolved proceedings of which the judge is aware, should be mindful of this fact and seek to minimize incidental effects when reasonable to do so, without compromising the integrity of the matter being heard (*Saskatchewan (Environment)*, at para. 54).

[64] The judge's intrusion on Kent's Action was particularly acute in his finding that a common law right of privacy and a related common law tort for intrusion upon seclusion exist in Newfoundland and Labrador (Decision, at paras. 18, 26). He also found that the City had committed this tort against Mr. Kent (Decision, at para. 98). Prior to the Decision, a common law right of privacy had not been definitively recognized by a superior court in Newfoundland and Labrador, and the existence of the tort was unsettled. The judge did not need to recognize a new tort in this province to fairly and fully decide the matter before him, and so he should not have.

[65] The common law tort for invasion of privacy referred to as "intrusion upon seclusion" was first recognized in Canada in *Jones v. Tsige*, 2012 ONCA 32. The defendant in *Jones* had repeatedly, over a period of several years, and without valid reason, accessed the banking records of the plaintiff, who was the defendant's common-law partner's ex-spouse. The Court of Appeal decided that a right of action for intrusion upon seclusion should be recognized as new tort in Ontario. The court noted that without recognizing such a tort, it would be "required to send [the plaintiff] away without a legal remedy" (at para. 69). Ontario did not have legislation akin to Newfoundland and Labrador's *Privacy Act*, which establishes that it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual (s. 3).

[66] To date, no other province without a statutory tort for invasion of privacy has definitively recognized the tort of intrusion upon seclusion (see eg. *Capital District*

Health Authority v. Murray, 2017 NSCA 28, at paras. 93-95, 100; *Unipco Ltd., a body corporate, Unipco Purchasing Program, a partnership v. Scott Mullin*, 2023 NBKB 200, at paras. 79-89; *B.M. v. W.S.*, 2024 ABKB 158, at paras. 77-80, aff'd 2024 ABCA 355). The situation is similar in the three other provinces that have legislation like section 3 of the *Privacy Act*: British Columbia, Saskatchewan and Manitoba (see eg. *Situmorang v. Google, LLC*, 2024 BCCA 9, at paras. 37, 86-89; *Roque v. Peters*, 2022 MBQB 34, at paras. 88-91, 99; *Bierman v. Haidash*, 2021 SKQB 44, at paras. 35-37).

[67] Prior to the Decision, the existence of the tort in this province was described as “an unsettled issue” in *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137 (at para. 26) and was identified as having “not yet been determined” in *Butt v. Kiewit Energy Corporation*, 2019 NLSC 119 (at para. 66), notwithstanding earlier recognition of a common law action for violation of privacy by the Newfoundland and Labrador Provincial Court in *Dawe v. Nova Collection Services (Nfld.) Ltd.*, 1998 CarswellNfld 270 (NLPC), and some acceptance of the tort recognized in *Dawe* in *Hagan v. Drover*, 2009 NLTD 160 (at paras. 163-164).

[68] Although the common law evolves over time, changes are generally slow and incremental (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760). Courts have declined to recognize new torts when adequate remedies already exist within the law to address the harm done (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 15-16; *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, at pp. 194-195; *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, at paras. 42-43, leave to appeal to SCC refused, 38630 (19 September 2019)).

[69] Mr. Kent's application did not seek a ruling on the City's liability to him. The adequacy of the remedy available under the *Privacy Act* to address any wrong done to Mr. Kent by the City was not at issue in the present case. The judge did not need to make legal findings about the City's liability or to recognize a new tort to decide whether the Disputed Messages should be sealed or subject to a publication ban, or to decide how they should ultimately be used on the Councilors' appeals. The recognition of intrusion upon seclusion in this province was not at issue in the adversarial dispute before the judge and was not argued by the parties. In these circumstances, it was unnecessary for the judge to recognize a new tort, and he should not have.

[70] Likewise, to decide this appeal, it is unnecessary for this Court to pronounce upon the availability of the tort of intrusion upon seclusion in this province. Consequently, I would not make any pronouncement on the availability of the tort and leave the question of its recognition to another day.

DISPOSITION

[71] For the forgoing reasons, I would allow the appeal and return Mr. Kent's interlocutory application to the court below for reconsideration. I would also set aside the cost award in the court below. Although the City has been the successful party, it did not seek costs before this Court and so none are ordered.

K.J. O'Brien J.A.

I concur : _____
W.H. Goodridge J.A.

I concur : _____
F.J. Knickle J.A.